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Torts

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TORTS

I. DEFAMATION AND INVASION OF PRIVACY

Crump v. Beckley Newspapers, Inc. 320 S.E.2d 70 (W. Va. 1984).

During the survey period the West Virginia Supreme Court of Appeals elaborated on a cause of action for defamation[1] and also created a cause of action—false light invasion of privacy—never before cognizable in this state. In *Crump v. Beckley Newspapers, Inc.*[2] the majority opinion, written by Chief Justice McGraw, reversed the trial court's grant of summary judgment for the newspaper publisher defendant which was based on the defendant's qualified privilege to publish articles of general public interest. The supreme court found material issues of fact remained in the defamation claim.[3] The court held that publicity, unreasonably placing an individual in a false light before the public, can give rise to an action for false light invasion of privacy.[4]

The plaintiff, a woman coal miner, was photographed with her knowledge and consent and with her understanding that the pictures were to be used in conjunction with a certain newspaper article about women coal miners.[5] A photograph of the plaintiff accompanied this article and her name was specifically mentioned.[6] Almost two years later, a second article, regarding serious problems faced by women miners and describing several incidents in which women miners were harassed and attacked, was published by the defendant newspaper accompanied by another photograph of the plaintiff.[7] The plaintiff was not mentioned by name in the second article, and the caption to her photograph read, "Women are entering mines as a regular course of action."[8] Plaintiff claimed in her affidavit that she had been questioned by acquaintances as to whether she had been subject to the type of sexual harassment described in the article.[9] The plaintiff complained to the newspaper about the unauthorized use of her photograph. The newspaper offered three alternatives for the plaintiff to clarify and/or rebut any false impressions created by the second article and the accompanying photograph.[10] Plaintiff declined the

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[1] The majority in Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 77 (W. Va. 1984) listed the elements of a defamation action by a private individual and the defenses available to a defendant in such an action. The elements to such a claim are: (1) a defamatory statement, i.e., a statement that harms the reputation of another by tending to adversely affect his community standing; (2) publication, i.e., a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) injury as a result of the publication. The court also discussed the defenses of absolute and qualified privilege, truth, and mitigation. *Id.* at 77-80.

[2] *Crump*, 320 S.E.2d 70. The case was originally decided Nov. 10, 1983. Justices Miller and Neely concurred and dissented in part, May 4, 1984.

[3] *Id.* at 75.

[4] *Id.* at 89.

[5] *Id.* at 75.

[6] *Id.*

[7] *Id.* The second published photograph of the plaintiff was different from the one appearing with the first article, but was taken at the same time the other photograph was taken. *Id.* n.1.

[8] *Id.* at 75.

[9] *Id.*

[10] *Id.* The majority noted that a retraction or apology from the publisher would act as "a mitigating

newspaper's offers and then brought suit alleging defamation and invasion of privacy for the unauthorized publication of the photograph with the second article.[11]

The West Virginia Supreme Court of Appeals reversed the trial court's award of summary judgment to the defendants for three reasons. First, the trial court erred in limiting its qualified privilege analysis solely to the content of the article.[12] The qualified privilege issue, presented by the facts of the case was whether the publication of plaintiff's photograph was "sufficiently in the public interest due to its relationship to the subject matter of the article."[13]

Second, the trial court erred when it ruled as a matter of law that the defendant did not abuse its privilege.[14] The majority held that there was an issue of material fact as to whether the defendant abused its privilege, because the plaintiff alleged that defendant acted with knowledge of the falsity or with reckless disregard of the truth.[15] Therefore, if the trial court, on remand, finds as a matter of law that a qualified privilege existed, abuse of that privilege will be a matter of fact for the jury to decide.[16]

Finally, the trial court did not adequately consider the invasion of privacy

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factor in the assessment of damages." *Id.* at 80 (citing Milan v. Long, 78 W. Va. 102, 105, 88 S.E. 618, 619 (1916)).

[11] *Crump*, 320 S.E.2d at 75-76.

[12] *Id.* at 81.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* The majority noted that,

> [i]f upon remand the trial court finds a qualified privilege to be present, this controversy as to the underlying truth or falsity of the statements contained in the presentation of Crump's photograph with the article makes the issue of abuse of privilege one for the jury. The key factual issue upon remand in relationship to Crump's defamation cause of action is whether the article involved implied that she had suffered any harassment in the course of her employment in the mining industry by its juxtaposition of her photograph.

Id.

The "key factual issue" noted by the court appears to address the falsity element, or the truth defense, of the defamation claim, as well as the resulting injury and not the factual issue concerning abuse of qualified privilege. However, the *Crump* opinion outlines what a plaintiff must show to defeat a claim of qualified privilege other than by a showing of actual malice. An abuse of the privilege is established, if the plaintiff shows:

> (1) an intentional publication of false defamatory material; (2) a publication of false defamatory material in reckless disregard for its truth or falsity; (3) a publication of false defamatory material made to persons who have no reason to receive the information; and (4) a publication of false defamatory material with a primary purpose unrelated to the purpose of the privilege.

Id. at 78.

On remand, the important factual issue at trial, if the trial court finds that a qualified privilege based on general public interest exists, would be whether the defendant acted with knowledge that, or in reckless disregard as to whether publishing the plaintiff's photograph in conjunction with the article would falsely imply that plaintiff has suffered harassment as a coal miner.

claim.[17] Twenty-five years ago, West Virginia first recognized invasion of privacy as a tort in *Roach v. Harper*.[18] Throughout the intervening years, the concept remained relatively undeveloped in West Virginia.[19] In the present case, the court broadly adopted the Restatement (Second) of Torts view of invasion of privacy.[20] The plaintiff in *Crump* alleged two invasion of privacy claims: (1) the use of her photograph was an appropriation and (2) the use of her photograph placed plaintiff in a false light before the public.[21] The court ruled that the "false light" claim deserved further consideration by the trial court.

The *Crump* majority found that the use of plaintiff's photograph in connection with the second article was not an appropriation.[22] "In order for a communication to constitute an appropriation, mere publication of a person's name or likeness is not enough, the defendant must take for his own use or benefit the reputation, prestige or commercial standing, public interest or other value associated with the name or likeness published."[23] The court ruled, as a matter of law, that the newspaper used the photograph of the plaintiff in connection with its second article because she was a woman coal miner and not because of some distinct value associated with the plaintiff's likeness.[24]

However, the court found that summary judgment was precluded with respect to the false light invasion of privacy claim because there remained an issue of material fact as to whether the publication of the photograph in conjunction with the article placed the defendant in a false light.[25] The majority noted that the same qualified privileges are effective defenses against a false light invasion of privacy claim if the court determines as a matter of law that the privileges exist, and the jury finds as a matter of fact that the privileges were not abused.[26] The court remanded the case for trial on the merits of plaintiff's defamation and false light causes of action.

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[17] *Id.* at 76.

[18] Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958). In *Roach*, a landlord allegedly installed a listening device in an apartment and listened to personal activity of a tenant.

[19] *Crump*, 320 S.E.2d at 84.

[20] The majority held that an "invasion of privacy" in West Virginia includes "(1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." *Id.* at 85 (quoting RESTATEMENT (SECOND) OF TORTS § 652A-652E (1977)). However, before *Crump*, the only invasion of privacy claim recognized in West Virginia was an unreasonable intrusion upon the seclusion of another. *Roach*, 143 W. Va. 869, 105 S.E.2d 564.

[21] *Crump*, 320 S.E.2d at 85.

[22] *Id.* at 86.

[23] *Id.*

[24] *Id.*

[25] *Id* . at 90. Although it is unclear from the majority's analysis in *Crump*, it appears that the elements of false light invasion of privacy in West Virginia are (1) a statement or representation that places the plaintiff in a false light; (2) the false light must be offensive to a reasonable person; (3) the representation must be widely publicized; (4) at least negligence on the part of the defendant; and (5) some resulting injury. *Id.* at 88-90.

[26] *Id.* at 83 n.5. Besides privilege, other defenses to a false light invasion of privacy claim include newsworthiness and consent. *Id.* at 83.

II. *MANDOLIDIS* CLAIM

Cline v. Joy Manfacturing Co., 310 S.E.2d 835 (W. Va. 1983).

In *Cline v. Joy Manfacturing Co.*,[27] the supreme court emphasized the difficulty that an injured employee has in meeting the "deliberate intent" exception in the State's Worker's Compensation Act.[28] Under *Mandolidis v. Elkins Industries, Inc.*[29] for an injured employee to receive damages outside of the Worker's Compensation Act, the plaintiff must show that: (1) the employer's misconduct was of an intentional or wilful, wanton and reckless character; (2) that the employer had knowledge and appreciation of the high degree of risk of physical harm to another created by the misconduct; and (3) that the misconduct was the proximate cause of the injury.[30] The majority in *Cline* reversed a four million dollar jury verdict for the plaintiff because the evidence failed, as a matter of law, to support a finding that the employer acted with deliberate intent as defined by *Mandolidis*.[31]

The plaintiff in *Cline* was a section foreman in defendant's coal mine and, at the time of his injury, was the only foreman in the mine.[32] During the shift when the accident occurred, a continuous mining machine had been moved into an area where water had collected but the regular operator had ceased operating the machine because of the water problem.[33] Subsequently, plaintiff began to operate the machine by standing outside the machine's operator cab and reaching in the cab to operate the controls, apparently because there was water in the cab.[34] Uncontroverted testimony at trial indicated that the plaintiff continued to mine some coal.[35] Plaintiff, by operating a certain "tram lever," then moved the continuous mining machine in a reverse direction.[36] He was pinned between the mine wall and the machine when the lever failed to automatically return to its neutral position when the plaintiff released it.[37] There was evidence that the tram lever

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[27] Cline v. Joy Mfg. Co., 310 S.E.2d 835 (W. Va. 1983).

[28] *Id.* at 837 n.4. The court noted:

The relevant portion of W. Va. Code § 23-4-2, is: 'If injury or death result to any employee from the deliberate intention of his employer to produce such injury of death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter.'

In the 1983 Legislative Session, W. Va. Code § 23-4-2 was amended. The above-cited statute was in effect at the time of the plaintiff's injury and so controls this case. *See* Lancaster v. State Compensation Comm'r., 125 W. Va. 190, 23 S.E.2d 601 (1942).

[29] Mandolidis v. Elkins Ind. Inc., 246 S.E.2d 907 (W. Va. 1978).

[30] *Id.* at 914.

[31] *Cline*, 310 S.E.2d at 836.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

had previously malfunctioned and that the problem had been reported to management, but never corrected.[38]

In an attempt to establish that the defendant acted with deliberate intent as defined by *Mandolidis*, Cline testified about an incident before the accident when he had been informed by his superior that he could lose his job if he did not protect the continuous mining machine.[39] Further, plaintiff claimed that he had no knowledge that the tram lever was malfunctioning.[40] On the other hand, the plaintiff alleged that the defendant did know of that condition and failed to repair it.[41] Plaintiff's theory of the case was that he tried to save the machine as previously ordered and that the broken tram lever caused his injury.[42]

In reversing the verdict and remanding the case for a new trial, the majority pointed to the "several critical and undisputed facts" which indicated that defendant did not act with the requisite deliberate intent to injure the plaintiff.[43] Writing for the majority, Justice Miller reiterated the *Mandolidis* standard and reaffirmed that decision's reasoning. Also, the majority cited recent federal court cases wherein the sufficiency of the evidence was examined in *Mandolidis* actions.[44] The majority held that the plaintiff's evidence failed, as a matter of law, to establish that defendant's misconduct was intentional or wilful, wanton, and reckless.[45]

The defendant failed to preserve its motion for a directed verdict at trial when it failed to renew the motion at the close of all evidence.[46] Therefore, the majority denied granting the defendant what would have amounted to a judgment notwithstanding the verdict.[47] Instead, the remedy granted to the defendant was a new trial.[48]

Chief Justice McGraw's strongly worded dissent, joined by Justice Harshbarger, was based on the principle that failure by a defendant at trial to renew its motion

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[38] *Id.* at 837.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 839. The critical facts upon which the majority placed emphasis were: (1) plaintiff was immediately responsible for control of the operations at the time and place the injury occurred; (2) no order was given by any other supervisory personnel concerning mining operations during the shift when the injury occurred; (3) after the time that the continuous mining machine entered the area with water, the plaintiff continued to mine more coal which took the machine further into the water; (4) water pumps were available to plaintiff for removal of the water from the area, but they were not used; and (5) there was no evidence that the water on the mine floor endangered the equipment.

[44] *Id.* at 839 (citing Smith v. ACF Industries, Inc., 687 F.2d 40 (4th Cir. 1982); Littlejohn v. ACF Industries, 556 F. Supp. 70 (S.D. W. Va. 1982)).

[45] *Cline*, 310 S.E.2d at 840.

[46] *Id.* (citing Chambers v. Smith, 157 W. Va. 77, 198 S.E.2d 806 (1973)).

[47] *Id.*

[48] *Id.* at 841.

for a directed verdict at the close of all evidence constitutes a waiver to any objection to the sufficiency of the evidence.[49]

III. Settlement Among Joint Tortfeasors

State ex rel. Vapor Corp. v. Narick, 320 S.E.2d 345 (W. Va. 1984).

The West Virginia Supreme Court of Appeals reaffirmed the policy in favor of compromise and settlement among parties to lawsuits by holding that an indemnity agreement between several, but not all co-defendants to a tort action, did not contravene public policy.

In *State ex rel. Vapor Corp. v. Narick*,[50] the court examined the validity of a settlement agreement among co-defendants in several lawsuits concerning an accident in which five persons were killed and certain property damage was sustained after liquid oxygen escaped from a storage tank.[51] After conducting pretrial discovery concerning all the cases, Air Products, a defendant, entered into an agreement with several, but not all, of the other defendants.[52] The agreement included a settlement and release of any claims for contribution or indemnity arising among the settling parties, and Air Products agreed to indemnify, defend and hold harmless the other settling defendants against any judgment rendered against them in favor of the plaintiffs or the nonsettling defendants for a certain undisclosed consideration.[53]

Mobay and I.V.S., the nonsettling defendants, filed motions in the Circuit Court of Marshall County to set aside the settlement agreement on the grounds that the agreement chilled the adversarial process.[54] In granting the motion, the lower court ruled that the settlement agreement was in violation of public policy.[55] The supreme court reversed in an opinion written by Justice Miller.[56] The court discussed the nature of suspect settlement agreements, commonly called "Mary Carter agreements,"[57] where a defendant in a multi-defendant case conspires with the plain-

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[49] *Id.* at 841 (McGraw, C.J., dissenting).

[50] State *ex rel.* Vapor Corp. v. Narick, 320 S.E.2d 345 (W. Va. 1984).

[51] *Id.* at 346-47. Initially, Mobay Chemical Corporation, on whose property the decedents were working, brought suit for property damage against Air Products & Chemical Corporation, the direct supplier of liquid oxygen to Mobay. Air Products filed third-party claims for indemnification or contribution against a group of vendors who supplied Air Products with machinery and equipment. Also, separate wrongful death actions were brought in Pennsylvania, Ohio, and West Virginia. In each wrongful death case, Mobay Chemical Corporation and Air Products & Chemicals Corporation were named as defendants. In the Pennsylvania and Ohio actions, Air Products again filed third-party claims against the vendor defendants. In the two West Virginia actions, the vendors were named as defendants in the plaintiffs' complaints.

[52] *Id.* at 347.

[53] *Id.* See also *id.* at 351-53 (the Mutual Settlement and Release Agreement between the settling parties).

[54] *Id.* at 347.

[55] *Id.*

[56] *Id.* at 346.

[57] The term "Mary Carter agreement" arises out of the case Booth v. Mary Carter, 202 So.2d 6

tiff to adjust liability to his favor and to the detriment of the other defendants.[58] The agreement between the settling defendants was found not to be a "Mary Carter agreement," since there was no agreement with the wrongful death plaintiffs and the amount paid to Air Products by the other settling defendants was a fixed sum and would not vary with the amount that Air Products might recover from the nonsettling defendants.[59] However, the court added that this type of settlement agreement must be promptly disclosed to the court and opposing counsel, and that such an agreement will be subject to judicial scrutiny.[60]

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8 (Fla. Dist. Ct. App. 1967), *overruled*, Ward v. Ochoa, 284 So. 2d 385, 388 (Fla. 1973).

[58] *Vapor Corp.*, 320 S.E.2d at 347.

[59] *Id.* at 349.

[60] *Id.* at 348.